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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

ROSALINDA GUERRA,

Petitioner,

v.

COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID T. LÓPEZ,
Counsel of Record
DAVID T. LÓPEZ & ASSOC.
3900 MONTROSE BOULEVARD
HOUSTON, TEXAS 77006-4959
(713) 523-3900

34 pp

QUESTION PRESENTED

Introduction: A telephone company employee represented by the Communications Workers of America, AFL-CIO, was discharged and filed a grievance under the collective bargaining agreement. While the grievance was pending more than 2 1/2 years, the employee filed an employment discrimination suit. The company settled on condition that the grievance, then scheduled for arbitration be withdrawn. The employee withdrew the grievance and sought damages against the union for breach of the duty of fair representation. A jury found that the union had breached the duty of fair representation in the handling of the grievance and returned a verdict for $61,707.50. The trial court held that despite the long wait and settlement with the company, the employee failed to exhaust available grievance remedies and rendered judgment as a matter of law, which was affirmed by the United States Court of Appeals for the Fifth Circuit.

Question: **Does a jury's finding of a union's breach of the duty of fair representation preclude the union's defense of failure to exhaust contract remedies?**

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The Fifth Circuit opinion was not officially reported. The court did not grant petitioner's motion for publication, which was joined by the respondent. Together with the trial court's judgment and the order denying petition for rehearing, the opinion is reproduced in the appendix (Pet. App.).

JURISDICTION OF THIS COURT

Judgment sought to be reviewed was entered by the United States Court of Appeals for the Fifth Circuit on June 14, 1996. An order denying petition for rehearing was entered on July 23, 1996. For the reasons set forth herein, this court should exercise its jurisdiction for review on writ of certiorari in accordance with the statutory provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VII to the Constitution of the United States provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Section 301 of the Labor-Management Relations Act, codified as 29 U.S.C. § 185, is reproduced in its entirety at Pet. App. 17. In material part it provides:

(a) Venue, amount and citizenship

Suits for violation of contracts between

an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Petitioner (hereinafter, employee) was discharged after 16 years of employment with Southwestern Bell on April 15, 1990. The jury found that the discharge was not for good cause, but Bell was not a defendant because of its having previously settled with the employee. (A statement of facts is included in the opinion of the appellate court. Pet. App. 6-10.)

A grievance was timely filed, and the employee separately filed charges of unlawful discrimination with the United States Equal Employment Opportunity Commission. While awaiting the grievance process, the employee sued. The suit was dismissed for failure to exhaust administrative remedies because the E.E.O.C. did not issue its notice of right to sue until a few days after the suit was dismissed. In January, 1993, pending disposition of an appeal, the employee and Bell settled at a mediation conference in which the union did not participate. The settlement did not include any release or waiver of claims against the union, but the company required that as a condition of the settlement the appeal be dismissed and the pending grievance be withdrawn.

The settlement was for more than the union attorney had told the employee the union expected to achieve in arbitration of

grievance. Record on Appeal, Vol. VII, p. 31. On January 11, 1993, counsel for the employee notified the union that the grievance should be withdrawn and the arbitration hearing set for January 22 cancelled.

Two years, eight months and 26 days after the employee was fired, the union was not ready for the arbitration hearing and had doubts as to its result:

Q: [at trial to the union attorney by the employee's counsel] If I understand your testimony, in summary, 11 days before the arbitration hearing, you had not yet completed your preparations and you did not know how the case was going to come out. Is that correct?

A: Yes, sir.

Record on Appeal, Vol. XI, p. 29.

The jury was instructed in material part as follows: "A union has considerable discretion in controlling the grievance and arbitration procedure. The question is not whether the employee is satisfied with the union representation or whether that representation was perfect. The test is basic fairness. So long as the union acts in good faith, it may exercise its discretion in determining whether to pursue or process an employee's grievance against the employer. Even if an employee's grievance has merit, the union's mere negligence or its exercise of poor judgment does not constitute a breach of its duty of fair representation. But where a union acts in bad faith and with hostility, discrimination or arbitrariness fails to process a meritorious grievance, the union violates its duty to fairly represent the union member who has made the grievance."

The jury found no breach by the local union, but found that the national union breached its duty of fair representation to the employee.

The district court, however, entered judgment as a matter of law against the employee because the employee failed to exhaust available remedies by allowing the arbitration to proceed.

An issue of law was submitted by the employee on appeal:

The Del Costello six-month limitation on hybrid § 301 actions was intended by the Supreme Court to foster prompt resolution of labor disputes. Is it consistent to demand that an employee complaining of discharge in breach of the union contract wait more than 2 1/2 years before concluding that by allowing the delay the union has breached its duty of fair representation? Should the trial court's rejection of damages against the union for alleged failure to exhaust grievance remedies be reversed?

The union in its responsive brief argued the issue as one of law: "By voluntarily settling her separate case against the Company and instructing the Union to withdraw her case from arbitration just 11 days before the scheduled arbitration hearing, [the employee] plainly did not exhaust available remedies."

The court of appeals, however, reviewed the matter on the facts already found by the jury, blamed the employee for the delay, and affirmed the trial court's judgment against the employee. In so doing, the appeals court disregarded the jury's factual finding and its effect on the issue of exhaustion, candidly stating that it chose instead to assume the role of fact-finder: "The fact of the

matter is this: On the brink of the much delayed and hard fought for arbitration, [the employee] cancelled it." Pet. App. 10 (Emphasis added.)

The appellate court opinion, Id., holds that in settling her case with the company the employee engaged in an election of remedies, even though the union refused to take part in the mediation and the settlement agreement did not settle any claim against the union.

SUMMARY OF THE ARGUMENT

This court specifically has held that a breach of the union's duty of fair representation dispenses with any need to exhaust the contractual grievance process. Long delay in a grievance has been recognized as evidence of a breach of the duty of fair representation. On instructions which accurately presented the heavy burden on the employee, the jury found the union breached its duty. Not only was it improper for the appeals court to re-examine the fact of the breach, but under the circumstances it was particularly egregious and injurious to the clear policy favoring rapid resolution of union disputes, which this court has enunciated.

ARGUMENT

The law defining the union's duty of fair representation has developed in cases tried to juries. Teamsters Local No. 391 v. Terry, 494 U.S. 558, 583 (1990)(Justice Stevens, concurring in part, and concurring in the judgment). "In most duty of fair representation cases, the issues, which require an understanding of the realities of employment relationships, are typical grist for the jury's judgment." Id.

The Fifth Circuit in this case deprived the employee of the Seventh Amendment right to a jury, which this court found applies to a case involving a union's breach of the duty of fair representation. Terry, supra, 494 U.S. at 573-74.

This court specifically has held that where the union has breached its duty of fair representation, the defense of failure to exhaust contract remedies is unavailing. Vaca v. Sipes, 386 U.S. 171, 186 (1967). As Justice Stevens noted in Terry, 494 U.S. at 583, Vaca itself was a jury case.

Citing Vaca and Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), this court reiterated that while an employee ordinarily is required to exhaust any grievance or arbitration remedies provided in the collective bargaining agreement, such is not required when there is a breach of the duty of fair representation. "In such instance, an employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding." Del Costello v. Teamsters, 462 U.S. 151, 163-64 (1983) (Emphasis added.)

Del Costello is instructive here for the reason advanced by the employee before the Fifth Circuit. In that case, this court repeated the observation in United Parcel Service v. Mitchell, 451 U.S. 56, 63-64 (1981) that since the Steelworkers Trilogy the court has recognized the importance of assuring that there be no delay in the grievance and arbitration process which gives meaning and content to the collective bargaining agreement.

In Mitchell, the court noted "the undesirability of the results of the grievance

and arbitral process being suspended in limbo for long periods." 451 U.S. at 64.

Very significantly, in this case, as in Mitchell, the claims against the company had been resolved. Justice Stevens, concurring in part and dissenting in part, observed that the arbitration proceeding in Mitchell could not resolve the claim of breach of duty of fair representation against the union. 451 U.S. at 73. "Although this claim is closely related to the claim against the employer, the two claims are nonetheless conceptually distinct." 451 U.S. at 72-73.

Given the consistent and long-standing public policy favoring speedy disposition of grievance and arbitration disputes and the firm precedent that a breach of fair representation absolves the employee from proceeding with a grievance, there certainly can be no justification for an appeals court to hold the employee's claim against the union hostage to a choice on how to resolve the claims against the company.

Certainly it would not strain judicial acumen to discern that a discharged employee required to wait three years for a determination of whether there was good cause for the discharge under the contract might as well not have any contract right at all. A working individual simply cannot place her life on hold for that period of time. A reasonable jury certainly can find that a long delay in processing a grievance is sufficient to taint the process and constitute a breach of the union's duty of fair representation. See, e.g., Williams v. Pacific Maritime Assn., 617 F.2d 1321, 1328-29 n. 13 (9th Cir. 1980)(Suggesting that a nine-month delay in the processing of a labor contract grievance was not reasonable.

In any event, it is beyond controversy that an appeals court may not re-examine the facts found by a jury. That is the precise teaching of the Seventh Amendment. Atlantic & Gulf Stevedores v. Ellerman Lines, 369 U.S. 355, 358-59 (Neither the Supreme Court nor the appeals court can redetermine facts found by the jury.)

In a submission joining the employee's motion to have the appellate opinion published, the union contended that the opinion presents an exposition of the law generally applicable to other cases of a similar nature.

To every union member in the country, this is indeed a troublesome proposition. That they might have to await years for the resolution of a grievance before concluding that the union is not discharging its duty of fair representation renders the protections of a contract effectively meaningless. To say that in the interim they cannot attempt to resolve claims not encompassed in the contract without risking loss of significant rights is a grossly unfair impediment to the increasingly effective use of alternatives to litigation.

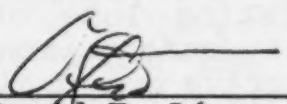
In this case, an employee, in accordance with the appellate opinion, would have waited more than three years for an arbitration award, reasonably assuming that the award would have been rendered at least three months after the hearing. In the grievance process, the union representative had spent some 15 minutes in preparation. Less than 10 working days before the hearing, the union attorney still was not prepared, and previously the union attorney had predicted that the arbitration could result in less relief than the employee was able to obtain by settlement.

Certainly the facts suggest unfairness. The significance of this application, however, goes far beyond the individual case. The decision of the Fifth Circuit does serious violence to important policies based on the opinions of this court. The Fifth Circuit plainly usurped the fact-finding role reserved to the jury by the United States Constitution. A clear statement from this court is needed not only to correct the judgment below, but to preclude a serious erosion of labor rights which will certainly continue if unchecked.

CONCLUSION

The judgment of the Fifth Circuit is in direct and serious conflict with principles established by this court and presages the continuation of a dangerous trend to disregard the constitutionally safeguarded role of the jury. Review is vital and must be granted.

Respectfully submitted,



David T. López
Counsel of Record
for Petitioner
3900 Montrose Boulevard
Houston, Texas 77006-4959
Telephone: 713-523-3900
Telecopier: 713-523-3908

OF COUNSEL:

David T. López & Assoc.